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In The Supreme Court of the United States

PATRICK L. BAUDE, *et al.*,
Petitioners,

v.

DAVID L. HEATH, Chairman of the Indiana Alcohol & Tobacco Commission, and WINE SPIRITS WHOLESALERS OF INDIANA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF INDIANA WINEGROWERS GUILD, INC., WINEAMERICA, INC., ILLINOIS GRAPE GROWERS & VINTNERS ASSOCIATION, INC., AND WISCONSIN WINERY ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

JON LARAMORE
Counsel of Record
HARMONY A. MAPPES
BAKER & DANIELS LLP
300 N. MERIDIAN ST., SUITE 2700
INDIANAPOLIS, IN 46204
317-237-0300

Counsel for Amici Curiae

March 11, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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STATEMENT OF INTEREST OF *AMICI*

This litigation profoundly affects the interests of all American wineries.[1] Indeed, Indiana's "face-to-face" requirement for shipping wine affects in-state and out-of-state wineries far more than it affects the wine-connoisseur Petitioners or the State and wholesaler Respondents. The "face-to-face" requirement challenged here merely inconveniences connoisseurs and may bear remotely on the State's tax revenue or the wholesalers' bottom line. But it transforms the business models and bottom lines of some wineries – undoubtedly harming wineries outside Indiana more severely than in-state wineries.

Amici are state and national associations of wineries that desire access to national markets for their products. More specific information about each *amicus* is provided in the Appendix.

STATEMENT

1. As detailed below, Indiana's wineries were permitted to freely ship wine to their customers for more than 30 years, during which there was not one single report that wine shipped by an Indiana winery was the source of unlawful consumption by underage

[1] As required by Rule 37.6, *amici* state that their counsel (listed on the signature page) authored this brief in whole, and neither their counsel nor any party made any monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief, and the letters of consent are on file with the Clerk. Counsel of record for all parties received notice at least 10 days before the due date of *amici*'s intention to file this brief.

persons. No complaint was filed with the Indiana Alcoholic Beverage Commission (now Alcohol and Tobacco Commission) or any local law enforcement agency claiming wine shipped from an Indiana winery was unlawfully consumed by underage persons.

The argument that the "face-to-face" requirement at issue in this litigation is necessary to deter potential underage drinkers from obtaining wine thus has no historical support and is mere speculation. For more than 30 years, during which no "face-to-face" requirement was in force, there was not a single report of underage drinkers obtaining wine in this manner.

2. Indiana's modern wine industry began in 1971, when the first permit was issued for a winery under an earlier version of the current statutory scheme. James L. Butler & John J. Butler, *Indiana Wine: A History* 141 (2001). Indiana had been a leader in winemaking in the early days of the Republic, but the industry took decades to revive after being shut down during Prohibition. *Id.* at 63-79.

The 1971 law gave Indiana wineries special status, essentially exempting them from the three-tier system governing the rest of the industry. Because Indiana wineries were unconstrained by the three-tier system, they could: (1) manufacture wine, (2) sell wine as wholesalers to retail stores and restaurants, and (3) sell directly to consumers in person and by direct shipping. Ind. Code § 7.1-3-12-5 (2002).[2]

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[2] The statute did not explicitly permit Indiana wineries to ship their wine to customers, but many wineries did so without interference by State alcohol regulators. *Bande v. Heath*, No.

Thus, Indiana wineries were allowed to fulfill the functions of all segments of the three-tier system – manufacturing, wholesaling, and retailing. Wineries were the only segment of the alcoholic beverage industry given this special status by Indiana law.[3] Under this system, Indiana wineries proliferated, from just two in the early 1970s to nearly 40 today. Butler & Butler, *supra*, at 142.[4]

3. *Granholm v. Heald*, 544 U.S. 460 (2005), caused the Indiana General Assembly to strip from Indiana's wineries many of the selling methods they had previously enjoyed. The 2006 changes removed Indiana wineries' authority to wholesale their own wine. Ind. Code § 7.1-3-12-5(a)(5) (as amended 2006). For the first time, Indiana wineries were prohibited from selling their wine to restaurants, liquor stores, or other retail outlets unless they could find a wholesaler to sell it for them. *Id.*

The 2006 legislation also restricted Indiana wineries' right to ship wine directly to consumers.

1:05-cv-0735-JDT-TAB, 2007 WL 2479587, at *4 (S.D. Ind., Aug. 29, 2007) ("Despite this regulatory framework, Indiana allowed in-state wineries to ship wines directly to their customers."). No party has disputed this finding.

[3] More recently, the Indiana General Assembly has granted some of these privileges to micro-brewers of beer. *See* Ind. Code § 7.1-3-2-7(5) (enacted 1993).

[4] The official website of the Indiana Wine Grape Council, a state-supported organization intended to enhance viticulture and the marketing of Indiana wine, listed 36 Indiana wineries open to the public. *See* Ind. Wine Grape Council, Wineries of Indiana, http://www.indianawines.org/wineries (last visited Mar. 9, 2009).

This law requires wineries to obtain a special permit and imposed the "face-to-face" requirement at issue in this case. Ind. Code §§ 7.1-3-26-7, 7.1-3-26-9(1)(A) (2006). Under the 2006 changes, Indiana wineries were still permitted to manufacture wine and to sell it by the glass and by the bottle from the tasting rooms most wineries operated, but they lost many advantages they previously possessed. Ind. Code § 7.1-3-12-5(a)(1), (3)(2006). Constricted sales opportunities and increased regulatory burdens led to the demise of at least one Indiana winery – Terre Vin in Rockville.[5]

All of the 2006 changes benefited wholesalers by explicitly barring both in-state and out-of-state wineries from selling directly to retailers. The 2006 changes also assisted wholesalers by prohibiting out-of-state wineries with wholesaling privileges under their state laws (including all wineries in California, Oregon and Washington) from shipping to Indiana customers – a provision that was invalidated by the District Court and the Seventh Circuit and is not at issue in this Court. As the District Court noted, "[t]he wholesale prohibition is not aimed so much at protecting Indiana's wineries as it is at guarding the bank accounts of Indiana's wholesalers." 2007 WL 2479587, at *17. The wholesalers lobbied for the legislation restricting wineries' prior rights to sell at wholesale and to ship to consumers.

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[5] Arthur E. Foulkes, *Hoosier Wineries, Wholesalers Locked in Legal, Legislative Battle*, Terre Haute Tribune-Star, Mar. 3, 2007, *available at* www.tribstar.com/local/local_story_062173710 ("New legislation passed in Indianapolis last year was 'almost 100 percent' of the reason the winery closed . . . .").

4. The "face-to-face" provision obviously burdens out-of-state wineries far more than it burdens Indiana wineries. An in-person visit by an Indiana consumer to an out-of-state winery, especially popular West Coast wineries, is less convenient and more expensive than a visit to an Indiana winery (or local wine festival, where a consumer may have "face-to-face" visits with multiple wineries).

Indiana's "face-to-face" requirement is only one among many barriers to unfettered interstate commerce in wine. Since 1975, the number of wineries in the United States has grown by a factor of ten, from 600 to nearly 6,000.[6] The vast majority of these wineries are small, farm-based, family-run enterprises. A typical winery occupies 20 acres and produces 4,000 cases of wine annually; more than 70% of American wineries produce fewer than 10,000 cases per year. Most wines are "hand sold" through direct contact between a person familiar with the wine and the buyer.

Recently, interest has grown in individualistic, hand crafted wines over commodity type wines but shipping restrictions diminish availability of these wines. Interest has increased in reserve wines (made from particular vineyard blocks where the soil produces better grapes), wines based on variations of winemaking technique (unfiltered, unfined, or carbonic maceration, for example), various blends (such as "Meritage"), and fruit wines. Wine is not fungible in

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[6] WineAmerica, Inc., Data on Wineries, http://www.wineamerica.org/newsroom/wine%20data%20center/2008%20Wineries%20by%20State.pdf

part because of "*terroir*," a French term referring to the aromas and tastes specific to wines of a particular area. *Terroir* depends on the characteristics of a particular vineyard—the interaction of climate, sun exposure, grape variety, water, soil, and local winemaking techniques.

Wholesale distribution is no panacea. Few wineries are large enough to have contracts with wholesalers to sell their wines in other states; the volume of wine they produce is too small to interest wholesalers.[7] This problem is exacerbated by dwindling numbers of wholesalers arising from consolidation in the distribution tier of the three-tier system. *Granholm*, 544 U.S. at 467; Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 6 (2003).[8] Even wineries that are able to distribute out-of-state through wholesalers are disadvantaged by the high costs of distribution, cutting their margins to the bone. Typically, a winery nets less than half the price of a bottle of wine sold through a wholesaler, especially if the winery is responsible for its own marketing costs.

Although burdened by myriad restrictions, shipping is the only practical method available for small wineries to distribute their product nationally and often the only method for larger wineries to distribute

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[7] For example, National Wine & Spirits, which markets itself as Indiana's largest wine distributor, sells wine from only 69 wineries. *See* NWS Wine Brands, http://www.nwscorp.com/IN Wines.asp (last visited Mar. 5, 2009).

[8] The FTC study also is available at www.ftc.gov/os/2003/07/winereport2.pdf.

specialized wines. Most states liberalized wine distribution statutes to enhance the economic benefits associated with wine production, including direct employment and tourism, often in depressed rural areas. But the post-*Granholm* trend is in the opposite direction. Currently, 38 states with 86% of the country's population permit some form of interstate direct shipping of wine – but states' shipping laws and regulations vary widely, making compliance nearly impossible, especially for small wineries.[9] For example, some states restrict the amount of wine that may be shipped to a customer in a year, but the limits differ from state to state; some require in-person visits of varying frequencies; and reporting and licensing requirements are inconsistent as well. This patchwork of regulations impedes interstate commerce in wine.

SUMMARY OF ARGUMENT

This Court should grant the petition because the Seventh Circuit's decision in this case, *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008), conflicts directly with the Sixth Circuit's decision in *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008), on a question of significant importance. The Indiana statute at issue in this case requires a consumer to make one "face-to-face" visit to a winery before the winery may ship wine to the consumer. Ind. Code § 7.1-3-26-6(4). Before *Cherry Hill Vineyards*, Kentucky's statute required a "face-to-face" visit before each shipment. Ky. Rev. Stat. Ann. §§ 243.155(2)(g),

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[9] R. Corbin Houchins, *Notes on Wine Distribution* (Dec. 4, 2008), *available at* http://shipcompliant.com/blog/document_library/dist_notes_current.pdf.

244.165(2), *invalidated by Cherry Hill Vineyards*, 553 F.3d at 435.

Rather than repeat Petitioners' arguments, *amici* limit their arguments to: (1) the importance of the issue in this case; and (2) from the wineries' unique perspective, the regulation at issue in this case does not "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

Specifically, because there is no evidence that wine shipment in Indiana was connected to underage consumption of alcohol during the 30 years it was allowed, the State's rationale that the "face-to-face" requirement reduces underage drinking is not a legitimate local purpose. Moreover, even if it were legitimate, the State has other, less restrictive means of limiting underage consumption including a requirement (already on the books) that proof of age be provided at the time the wine is delivered.

Amici fully support Petitioners' argument that Indiana's statute requiring a face-to-face visit at the winery before wine may be shipped to a customer violates the Commerce Clause in practical effect by placing a greater burden on transactions across state lines than on intrastate transactions. *Granholm*, 544 U.S. at 487. As the Sixth Circuit put it, the "in-person requirement makes it economically and logistically infeasible for most customers to purchase wine from out-of-state small farm wineries." *Cherry Hill Vineyards*, 553 F.3d at 433.

REASONS FOR GRANTING THE PETITION

I. This case presents an important Commerce Clause question.

If this Court does not resolve the conflict between this case and *Cherry Hill Vineyards*, the question of what burdens may be placed on interstate shipment of alcoholic beverages will remain unanswered, the patchwork of state regulations will grow more disparate, and burdens on interstate commerce will escalate. As Justice Jackson wrote:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

Until this Court resolves the scope of restrictions that States may place upon out-of-state wineries, schemes to restrict wine sales will continue. These efforts will be stoked by wholesalers, which (as the district court pointed out) are motivated to ensure that all wine be distributed through wholesalers, no matter where the wine is manufactured. Before *Granholm*,

wholesalers were willing to tolerate deviation from the three-tier system by small, local wineries. But when *Granholm* required uniform rules for in-state and out-of-state wineries, wholesalers contrived restrictions that appeared facially neutral but had the practical effect of disproportionately burdening interstate commerce, as this case shows.

Resolving the question in this case will assist in calming the regulatory waters roiled by *Granholm*.

II. Indiana's "face-to-face" rule serves no legitimate local purpose that cannot be adequately served by reasonable alternatives.

A. Thirty years of history show that the "face-to-face" requirement is unnecessary to prevent underage consumption.

The factual record is clear that there was no evidence whatsoever in Indiana that wine shipment – which occurred for 30 years before the "face-to-face" requirement was enacted – was used by underage persons to obtain alcohol. Thus, no factual ambiguity in this case interferes with the Court's ability to cleanly decide the constitutionality of the "face-to-face" requirement.

The primary rationale advanced by the State and Indiana's wine wholesalers for the "face to face" requirement thus lacks any basis in fact or in this record. The State and the wholesalers argue that the "face-to-face" requirement is necessary to prevent underage persons from obtaining and consuming wine by shipment. But nothing in the experience of

Indiana's law enforcement agencies or its wineries supports this position.

The lack of evidence of underage consumption from wine shipment comports with common sense. Potential underage drinkers would have to engage in substantial planning to order wine in advance, obtain false identification that would pass muster in the on-line or telephone transaction and at the point of delivery, pay the additional costs that accompany shipping, and receive the wine in time for planned consumption. This kind of advance planning is inconsistent with the spur-of-the-moment nature of underage drinking. It is far easier for a prospective underage consumer to use a false identification card to obtain alcohol at a package store or to employ an adult to procure alcohol.

The record in this case establishes that fear of underage drinking arising from wine shipping is pure speculation, lacking factual basis. Indiana's regulatory agency, the Alcohol and Tobacco Commission, produced no example of underage drinking arising from wine shipping.

Amici's position on this topic is consistent with the authoritative report of the Federal Trade Commission, cited in *Granholm*, 544 U.S. at 490-91, which supported Internet sales of wine to broaden consumers' choices and reduce costs. The FTC found that "[i]n general, . . . state officials report that they have experienced few, if any, problems with interstate direct shipment of wine to minors." Fed. Trade Comm'n, *supra*, at 31. None of the eleven states responding to the FTC's survey could cite any specific instance of wine shipment to minors. *Id.* at 32-33. For example,

Colorado indicated that "we do not have any specifics of shippers shipping directly to minors," and California officials testified that, "for at least 20 years there was never a problem that was brought to our attention with regard to sales to minors . . . ." *Id.* at 32.

As this Court said in *Granholm*, there is "little evidence that the purchase of wine over the Internet by minors is a problem." *Granholm*, 544 U.S. at 490. Minors prefer to consume "beer, wine coolers, and hard liquor" rather than wine. *Id.* (citing Fed. Trade Comm'n, *supra*, at 12). They "have more direct means" than shipment to obtain illicit alcohol, and obtaining wine by shipment is "an imperfect avenue of obtaining alcohol for minors who . . . want instant gratification." *Id.* (internal quotation omitted). *Granholm* invalidated discriminatory state regulations in part because there was no clear evidence that the regulations prevented any real harm, such as underage consumption.

B. There are reasonable alternatives to the "face-to-face" requirement.

Even if there were evidence that underage drinking arose from wine shipping, there is no justification for Indiana's imposition of the "face-to-face" requirement because alternative, less-restrictive means are available to address underage drinking that might arise from wine shipment. *Granholm* also noted the availability of alternative, less restrictive means to guard against underage consumption. *Granholm*, 544 U.S. at 490-91. These could include a requirement for providing identification upon delivery. *Id.* at 491. They could include licensing of carriers. Fed. Trade

Comm'n, *supra*, at 29-30.[10] Some states also have chosen to use on-line age verification services, which are now commercially available. *See, e.g.*, Mich. Comp. Laws § 436.1203(3)(d), *amended by* 2008 Mich. Pub. Act 474 (eff. Mar. 31, 2009). But this Court need not address on-line verification because Indiana already has in place alternative means of age verification that are less burdensome on interstate commerce.

Indiana's wine statutes already contain multiple reasonable alternatives to the "face-to-face" requirement. Indiana's statute requires wine shippers to obtain a special license subjecting them to the state's full regulatory authority. Ind. Code § 7.1-3-26-5; *see Granholm*, 544 U.S. at 492 (explaining that wineries have incentives to obey state laws because violations subject them to losing state and federal licenses). Indiana also requires delivery services that transport shipped wine to obtain licenses: to get a license, a delivery service must show its "reliability and responsibility," must post a bond, and must file with the state descriptions of the vehicles it uses to make deliveries. Ind. Code §§ 7.1-3-18-1, 7.1-3-18-5, 7.1-3-18-6.

Furthermore, Indiana law requires that wineries use only licensed delivery services, and upon delivery the carrier must obtain proof that the person accepting the delivery is at least 21 years old. Ind. Code § 7.1-3-26-9(2)(D). Each container also must be labeled, and

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[10] "New Hampshire, for example, requires an adult signature at the time of delivery, permanently revokes the direct shipping permit of anyone who ships wine to minors, and declares him guilty of a class B felony." Fed. Trade Comm'n, *supra*, at 34 (footnote omitted).

the label must state prominently that only someone 21 or older can receive the delivery. *Id.* at (B).

Indiana has not shown that the identification-upon-delivery system is any less reliable than the challenged face-to-face requirement. The two transactions are fundamentally the same. In each case, an employee of a licensed entity (a winery or a carrier) is required to obtain proof that the person who will receive or is receiving wine is at least 21. Both of these transactions also are fundamentally the same as those that occur in restaurants or liquor stores, where employees of licensed entities check proof of age. None of these methods is foolproof, but there is no evidence that the identification-upon-delivery method already in Indiana law is less effective than these other methods.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

Jon Laramore
Counsel of Record
Harmony A. Mappes
BAKER & DANIELS LLP
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204
317-237-0300

Counsel for Amici Curiae
Indiana Winegrowers Guild, Inc.
WineAmerica, Inc.
Illinois Grape Growers & Vintners Association, Inc.
Wisconsin Winery Association, Inc.

APPENDIX

APPENDIX A

The Indiana Winegrowers Guild is the statewide trade association of Indiana's wineries. It is a not-for-profit corporation organized under Indiana law, and it is tax exempt under Section 501(c)(6) of the Internal Revenue Code. The Guild represents the interests of Indiana wineries in the Indiana General Assembly, and it participated as *amicus curiae* in the district court and Seventh Circuit proceedings in this matter.

WineAmerica, Inc., represents the interests of American wineries and promotes the advancement of the wine industry. It has more than 800 member wineries in 48 states and is the only wine trade association with a national membership. WineAmerica opposes protectionist state laws that prevent its members from selling their wine directly to consumers across the country.

The Illinois Grape Growers and Vintners Association, Inc. is a not-for-profit organization dedicated to developing the viticulture and enology interests of Illinois through information exchange and cooperation among Illinois grape producers and vintners. Seventy Illinois wineries and 450 vineyards create a direct economic impact of more than $253 million annually and place Illinois consistently among the top 12 wine-producing states.

The Wisconsin Winery Association, Inc. has 34 member wineries, all of which are family-owned and

family-run enterprises and many of which use Wisconsin-grown agricultural ingredients. The Association's membership has doubled in the last two years. By selling the majority of their product on-premises, these wineries have become destinations, bringing tourism dollars into the state. With the recent growth in membership and the small size of most of the member wineries, the Association has focused its efforts most recently on production and promotion issues.